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No.

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1995

JAN M. WEINBERG,

Petitioner,

vs.

MANAGEMENT COMPANY ENTERTAINMENT GROUP, INC., FORUM HOME VIDEO, INC., JONATHAN D. KRANE, WILLIAM J. ROUHANA, JR. and WINSTAR CORPORATION,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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27 pp

QUESTION PRESENTED FOR REVIEW

I. Does a minority shareholder of a closely held corporation have a private right of action against a dominant majority shareholder and the directors of the corporation who have breached their fiduciary duty to that minority shareholder?

II. Did the District Court and Court of Appeals have the right to interfere with an agreement of stipulation between petitioner and respondent which had been approved by the Bankruptcy Court for the Central District of California?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Statement of Jurisdiction 1

Statutes Involved 1

Statement of the Case 1

Reasons for Granting the Writ 4

I. This case raises an issue of great legal significance for minority shareholders of closely held corporations where a dominant shareholder and the corporation's directors have breached their fiduciary duty to them. 4

II. There is direct conflict between the decision of the Court of Appeals for the Second Circuit and prior decisions of this Court. 6

III. The District Court and Court of Appeals had no right to interfere with the agreement of stipulation between the parties approved by the Bankruptcy Court for the Central District of California. 7

Contents

	Page
Conclusion	7

TABLE OF CITATIONS

Cases Cited:

In re Ionosphere Clubs, Inc., 17 F.3d 600 (2d Cir. 1994) .	6
Pepper v. Litton, 308 U.S. 295 (1939)	6, 7
Strong v. Repide, 213 U.S. 419	6

Statute Cited:

28 U.S.C. § 1254(1)	1

APPENDIX

Appendix A — Order Denying Petition for Rehearing in the United States Court of Appeals for the Second Circuit Filed December 21, 1995	1a
Appendix B — Opinion of the United States Court of Appeals for the Second Circuit Filed November 14, 1995	2a
Appendix C — Memorandum and Order of the United States District Court for the Southern District of New York Filed April 12, 1992	7a

I, Jan M. Weinberg, respectfully pray that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Second Circuit entered on October 13, 1995. My timely motion for rehearing was denied on December 21, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit denying the petition for rehearing is printed hereto at page 1a of the Appendix. The opinion of the United States Court of Appeals for the Second Circuit is appended hereto at page 2a. The opinion of the United States District Court for the Southern District of New York is appended at7a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on October 13, 1995. My Petition for Rehearing, which was timely filed, was denied by the United States Court of Appeals for the Second Circuit on December 21, 1995. This Court has jurisdiction to review the Judgment of the United States Court of Appeals for the Second Circuit by Writ of Certiorari pursuant to 28 U.S.C § 1254 (1).

STATUTES INVOLVED

There are no statutory provisions involved.

STATEMENT OF THE CASE

On December 31, 1987 I entered into a contract with the respondent Management Company Entertainment Group, Inc. ("MCEG") to sell 40 of my 50 shares of voting common stock in a company which I founded known as Forum Home Video, Inc. ("Forum"). In return I received an option to purchase MCEG

stock and 200 newly issued preferred shares of Forum. I was to have been paid dividends of 12% per annum on my preferred shares. I also received the right to redeem my preferred shares for $200,000 at any time after the expiration of three years from the date of the agreement.

As a result of these transactions, I became a minority owner of Forum common stock and its only preferred shareholder. MCEG was controlled by respondents Jonathan D. Krane ("Krane"), William J. Rouhana, Jr. ("Rouhana") and Winstar Corporation ("Winstar"). Winstar was a corporate vehicle through which Rouhana provided management services to MCEG. Krane and Rouhana were officers and directors of MCEG. After the acquisition of Forum, Forum's operation was also under the direct control and supervision of respondents Krane, Rouhana and Winstar.

At the time of the acquisition, Forum had significant assets in the form of customers, suppliers, licensing rights, cash in banks, accounts receivable and a talented management team. In 1989 Krane, Rouhana and Winstar caused Forum to enter into an agreement with Virgin Visions, Inc. ("VVI") whereby Forum's business and principal assets were transferred to VVI. At that time Krane, Rouhana and Winstar also decided to take MCEG's distribution business out of Forum and to consolidate it in VVI. As result of these transactions, Forum ceased to operate and was left as an empty corporate shell. After the VVI transaction, Krane was quoted in a prominent trade journal as saying that "Forum does not exist as a separate entity any more."

Rouhana admitted that the two minority shareholders of Forum (Medusa and Weinberg) were adversely affected and had legitimate complaints. The respondents addressed Medusa's complaint. An agreement was entered into between VVI, Medusa, Forum and MCEG pursuant to which Medusa received

three million dollars. Nothing was ever done to compensate me for my loss. Krane, Rouhana, Winstar and MCEG breached their fiduciary duty to me by stripping Forum of its assets and transferring them to a different operating entity leaving Forum as a non-operating shell corporation rendering my common and preferred shares worthless.

Though finding "much evidence" of breach of fiduciary duty, the District Court dismissed my claims on summary judgment against all defendants in April, 1992. Upon appeal, the Court of Appeals for the Second Circuit returned the case to the District Court for lack of a final judgment finding that the District Court was barred by the automatic bankruptcy stay from rendering judgment for Forum and MCEG.

In August, 1994 I entered into a stipulation with respondents MCEG and Forum pursuant to which those corporations agreed to a default judgment against them in this case provided that I could only enforce the judgment against their liability insurers and the proceeds of their liability insurance policies. On August 26, 1994 the Stipulation was approved by an order of the United States Bankruptcy Court for the Central District of California and the automatic bankruptcy stay was lifted for the sole purpose of allowing judgment to enter in this case in accord with the Stipulation. In January, 1995 the District Court again granted summary judgment of dismissal on all counts and refused to enter judgment against MCEG and Forum in accord with the Stipulation. In October, 1996 the Court of Appeals for the Second Circuit affirmed and, in December 1996, denied my petition for rehearing.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE RAISES AN ISSUE OF GREAT LEGAL SIGNIFICANCE FOR MINORITY SHAREHOLDERS OF CLOSELY HELD CORPORATIONS WHERE A DOMINANT SHAREHOLDER AND THE CORPORATION'S DIRECTORS HAVE BREACHED THEIR FIDUCIARY DUTY TO THEM.

The District Court and the Court of Appeals acknowledged my injury but held that I have no private right of action.

I was the owner of 10 of the common stock of Forum and the only owner of preferred stock of Forum. MCEG was the owner of the majority of the common stock of Forum and both MCEG and Forum were controlled by Krane and Rouhana who were directors and officers of both corporations. They breached their fiduciary duty to me as a minority shareholder when they looted Forum by:

(a) transferring substantially all of Forum's assets to Virgin Visions, Inc. without adequate consideration;

(b) failing to give me notice of such transfers;

(c) failing to hold shareholder meetings;

(d) failing to act in the best interest of Forum in its dealings with MCEG of which they were also directors, officers and controlling persons;

(e) failing to act in good faith in actions taken and agreements made among Forum, MCEG and Virgin Visions;

(f) failing to give Forum shareholders notice and to seek their approval of the transfer and/or relinquishment of substantially all of the corporate assets of Forum.

The District Court found the following with respect to my claim for corporate waste and breach of fiduciary duty:

> This branch of the complaint pleads a good claim for corporate waste by the individual defendants as officers and directors of Forum, dealing with MCEG, in which they also had interests of a conflicting nature. There is much evidence to suggest a breach of fiduciary duty. The difficulty is that this claim belongs to Forum and must be asserted derivatively for the benefit of Forum's shareholders and creditors.

Appendix C, 14a.

The Court of Appeals for the Second Circuit agreed with the District Court that as a minority shareholder in Forum there was much evidence that the respondents had breached their fiduciary duty to me but said I had no right to bring a private direct action against them. I was, at the time this case was commenced, the sole minority shareholder of Forum and its only preferred shareholder. Moreover, Forum was a company which I and my partner had founded with great effort and at great expense. These respondents effectively stole my company from me by failing to pay me the consideration which they had promised and by thereafter looting the company of all of its assets. Yet I have been told by the District Court and the Court of Appeals that I have no recourse by way of a private direct action to redress these injustices. This cannot be the law.

II.

THERE IS DIRECT CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT AND PRIOR DECISIONS OF THIS COURT.

The Court of Appeals in denying me a private right of action relied on *In re Ionosphere Clubs. Inc.*, 17 F.3d 600, 605-06 (2d Cir. 1994). It held that to sue individually I must be injured directly or independently of the corporation and must allege more than an injury resulting from a wrong to the corporation. In fact I have alleged such wrong as required by the *Ionosphere* case. But my petition goes further than that. I submit that the *Ionosphere* case is contrary to prior case law of this Court.

This Court has clearly held that the breach of fiduciary duty of a director or dominant shareholder gives rise to direct actions by minority stockholders in their own right. *Pepper v. Litton*, 308 U.S. 295, 307 n. 15 (1939); *Strong v. Repide*, 213 U.S. 419. The rule of the *Ionosphere* case as applied in this case is directly contrary to the principles set forth in those cases. As a result it is incumbent upon this Court to grant this Petition and to clarify the rights of minority shareholders in a closely held corporation who have been cheated by the dominant shareholders of the corporation and its directors.

It is essential for the Court to do this because minority shareholders in a closely held corporate setting such as mine are extremely vulnerable to abuses by the dominant shareholder and its officers and directors and must have a right of direct action to redress these abuses.

III.

THE DISTRICT COURT AND COURT OF APPEALS HAD NO RIGHT TO INTERFERE WITH THE AGREEMENT OF STIPULATION BETWEEN THE PARTIES APPROVED BY THE BANKRUPTCY COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

I reached an agreement with MCEG and Forum which was freely entered into by all parties. MCEG and Forum stipulated to judgment in this case. The stipulation was reviewed and approved by the United States Bankruptcy Court for the Central District of California which had jurisdiction over all the parties.

The District Court in New York and the Court of Appeals had no right to interfere with that agreement.

This Court is asked to correct this injustice. *Pepper v. Litton*, *supra* at 305.

CONCLUSION

For all of the above reasons the Petition should be granted.

Respectfully submitted,

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APPENDIX A — ORDER DENYING PETITION FOR REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED DECEMBER 21, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of December, one thousand nine hundred and Five.

Present:
Hon. RALPH K. WINTER
Hon. DENNIS G. JACOBS
Hon. PIERRE N. LEVAL
CIRCUIT JUDGES,

95-7212 Weinberg v. Management Co. Enter

A petition for rehearing having been filed herein by Pro Se Appellant Jan Weinberg, Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

GEORGE LANGE III, Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED NOVEMBER 14, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse, Foley Square in the City of New York, on the 13th day of October one thousand nine hundred and ninety-five.

Present:

Honorable Ralph K. Winter,
Honorable Dennis G. Jacobs,
Honorable Pierre N. Leval,
Circuit Judges.

#95-7212

JAN M. WEINBERG,

Plaintiff-Appellant,

v.

MANAGEMENT COMPANY ENTERTAINMENT GROUP, INC., FORUM HOME VIDEO, INC., JONATHAN D. KRANE, WILLIAM J. ROUHANA, JR., and WINSTAR CORPORATION,

Defendants-Appellees.

ORDER

Appendix B

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was submitted.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Jan Weinberg appeals from Judge Brieant's grant of summary judgment dismissing his complaint. Weinberg argues that: (i) he has standing to assert a direct, as opposed to a derivative, claim for breach of contract, corporate waste, misappropriation of corporate assets and breach of fiduciary duty; (ii) there is a genuine issue of material fact with respect to his securities fraud claim; (iii) his common law fraud claim similarly survives; and (iv) he should be granted a default judgment against the corporate defendants pursuant to their stipulation with him and pursuant to an order of the bankruptcy court. We disagree.

We review the grant of a motion for summary judgment *de novo. United States v. Articles of Banned Hazardous Substances,* 34 F.3d 91, 96 (2d Cir. 1994). Summary judgment is appropriate where there are no genuine issues as to any material fact and the prevailing party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "[I]n assessing the record to determine whether there is a genuine issue as to any material fact, the court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought." *Cronin v.*

Appendix B

Aetna Live Ins. Co., 46 F.3d 196, 202 (2d Cir. 1995) (citations omitted).

We discussed the distinction under Delaware law between a direct action and a derivative action in *In re Ionosphere Clubs, Inc.*, 17 F.3d 600, 605-06 (2d Cir. 1994). We held that to have standing to sue individually, a plaintiff must be injured directly or independently of the corporation and that the plaintiff must allege more than an injury resulting from a wrong to the corporation. *Id.* at 606.

Weinberg claims that appellees Jonathan Krane, William Rouhana, WinStar Corporation and Management Company Entertainment Group, Inc. ("MCEG"), without notice to him as a shareholder of Forum Home Video, Inc., looted Forum by transferring all of its business and assets to Virgin Visions, Inc. He alleges that he was damaged by the corporations' consequent inability to pay all the dividends due him or to redeem his preferred shares. We held in *Ionosphere* that an injury to preferred shareholders' contractual rights to receive dividends were not inflicted "directly" or "independently of the corporation" and that these injuries were only an indirect consequence of the wrongs against the corporation. *Id.* at 606. Therefore, the injury to Weinberg with regard to the redemption of his preferred shares is similarly an indirect consequence of wrongs against the corporation.

With regard to Weinberg's argument that even if this claim is not direct, it is derivative and that he has standing to maintain such action, we agree with the district court that because he is no longer a shareholder, Weinberg may not bring such an action now.

Appendix B

Weinberg also alleges violations of Section 12(2) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and SEC Rule 10b-5, based on alleged misrepresentations that: (i) Forum would pay dividends on Weinberg's preferred stock; (ii) Weinberg would have a "put" option to compel Forum to repurchase the preferred shares; (iii) MCEG would develop and expand the business of Forum; and (iv) MCEG would acquire Weinberg's other companies. However, Weinberg has shown only that the lack of commercial success prevented appellees from carrying out their promises. Weinberg's common law fraud claim fails for the same reasons.

Weinberg argues that he is entitled to a default judgment against the corporate defendants in accordance with their stipulation. In *Davis v. Musler*, 713 F.2d 907, 912 (2d Cir. 1983), we stated that default judgments "implicate sharply conflicting policies . . . and the trial judge, who is usually 'the person most familiar with the circumstances of the case and is in the best position to evaluate the good faith and credibility of the parties,' is entrusted with the task of balancing these competing considerations." We stated there that the decision of the district court would be upheld unless "clearly wrong." *Id.* 912. The district court noted that the stipulation and the order that resulted therefrom "implicated parties other than the plaintiff and the debtors, namely, the insurers who were not parties to it," and said that it would be "a rather bizarre violation of the insurer's right to due process" to permit a default judgment to be entered against the corporation which would be enforceable against them. We agree.

We therefore affirm.

Appendix B

s/ Ralph K. Winter
Hon. Ralph K. Winter, U.S.C.J.

s/ Dennis G. Jacobs
Hon. Dennis G. Jacobs, U.S.C.J.

s/ Pierre N. Leval
Hon. Pierre N. Leval, U.S.C.J.

A TRUE COPY
GEORGE LANGE III, CLERK
s/ George Lange III

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED APRIL 22, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 4494 (CLB)

JAN M. WEINBERG,

Plaintiff,

-against-

MANAGEMENT COMPANY ENTERTAINMENT GROUP, INC., FORUM HOME VIDEO, INC., JONATHAN D. KRANE, WILLIAM J. ROUHANA, JR. and WINSTAR CORPORATION,

Defendants.

MEMORANDUM & ORDER

Brieant, Chief Judge

In this action, pleading seven different claims essentially based on securities fraud, plaintiff and the defendants Krane, Rouhana and Winstar each seek summary judgment in their favor. The remaining defendants, Management Company Entertainment Group, Inc. ("MCEG") and Forum Home Video, Inc., ("Forum") have each found refuge as debtors in proceedings pending in the United States Bankruptcy Court for

the Central District of California, filed respectively on October 31, 1990 and March 8, 1991.[1] *See* Doc. 10 and 29.

The motions were heard and fully submitted for decision on March 25, 1992.

The complaint, which pleads diversity, as well as federal question jurisdiction, alleges the following claims: In the First Count plaintiff alleges a violation of Section 12(2) of Securities Act of 1933, 15 U.S.C. §77-1 in connection with the sale by plaintiff of securities in Forum to MCEG in return for preferred shares of Forum and option rights. Complaint ¶ 21. The Second Count alleges securities fraud and violations of Section 10b of the Securities Exchange Act of 1934, 15 U.S.C. §78J(b), and Rule 10b-5, 17 CFR §240.10b-5. Complaint ¶ 28. The Third Count alleges common law fraud including reliance, arising out of the same transaction alleged in the first two counts. Complaint ¶ 29-32.

The Fourth Count alleges that plaintiff is a 10% common stock shareholder of Forum and owner of 200 shares of preferred stock of Forum, that MCEG as the owner of the majority of the common stock of Forum, and Krane and Rouhana as directors, and officers and controlling persons of Forum and MCEG, breached their fiduciary duty to the plaintiff as a shareholder of Forum by:

> (a) transferring substantially all of Forum's assets to MCEG Virgin Home Entertainment without adequate consideration;

---

1. On October 31, 1990, an involuntary petition under Chapter 7 was filed against MCEG. Doc. 10. On March 8, 1991, Forum filed a voluntary petition under Chapter 11. Doc. 29, ¶ 3.

(b) failing to give shareholders notice of such transfers;

(c) failing to hold shareholder meetings;

(d) failing to act in the best interest of Forum in its dealings with MCEG of which they are also directors, officer and controlling persons;

(e) failing to act in good faith in actions taken and agreements made among Forum, MCEG and Virgin Visions;

(f) failing to give Forum shareholders notice and to seek their approval of the transfer and/or relinquishment of substantially all of the corporate assets of Forum.

This claim seeks recovery of "damages suffered by plaintiff as a shareholder of Forum." Complaint ¶ 38.

The Fifth Count alleges a breach of contract (the "Stock Purchase Agreement" of December 31, 1987) in that, defendants "fail[ed] to cause Forum to pay the monthly dividends on the preferred shares . . . and by caus[ing] the plaintiff's shares and option rights to be substantially worthless by transferring substantially all of Forum's assets to MCEG Virgin Home Entertainment without adequate consideration." Complaint ¶ 42. This claim also pleads a breach of the obligation of good faith with respect to the Stock Purchase Agreement. The Sixth Count is the traditional Civil RICO, and the Seventh Count pleads a Civil RICO conspiracy.

Appendix C

The complaint seeks an "immediate accounting of all transactions pertaining to the transfer of the assets of Forum to MCEG Virgin Home Entertainment, MCEG, Krane or Rouhana" and compensatory and punitive damages. Complaint, at 19-20.

The facts to the extent revealed by documents and affidavits as viewed most favorably to the plaintiff, disclose that prior to December 31, 1987 plaintiff Weinberg and Michael Olivieri, an individual not a party to this suit, were the only shareholders in Forum each holding an equal amount of shares. On that date, advised by counsel of their own choosing, and negotiating at arms length, they entered into an extensive formal written agreement consisting of 69 pages including exhibits annexed, whereby MCEG acquired 90% of the outstanding common shares of Forum with Weinberg retaining 20 shares representing 10% of the outstanding common shares.

Under the Agreement the purchaser MCEG was required to and did deliver options to purchase $425,000 shares of MCEG at a $1.00 per share during a five year period, together with 200 shares of non-voting redeemable, non-transferable preferred stock to be issued solely to Mr. Weinberg with annual cumulative dividends thereon at a per annum rate of 12% payable monthly. The Agreement provided that "Weinberg may put the Preferred Stock to Company [MCEG] after 3 years from the closing date, and the Company will have a call on the Preferred Stock at any time."

The Agreement contained all of the usual warranties and representation customarily in vogue in connection with the purchase or sale of business. The Purchaser agreed to obtain the release of sellers and Alison Olivieri, from personal liability on a bank guaranty up to $175,000.00, and did so. Section 10.3 of the Stock Purchase Agreement provided as follows:

Appendix C

> This Agreement and the Schedules and documents referred to herein, constitute the entire agreement between the parties pertaining to the subject matter contained herein and therein, and supersede all prior agreements, representations and understandings of the parties. No other representations, promises, affirmations, inducements or other statements, written or oral, which may have been made shall be of any effect or shall form any part of this agreement or the transactions contemplated thereby. No termination, supplement, modification or amendment of this Agreement shall be binding upon the parties hereto unless executed in writing by the parties hereto. No waiver of any of the provision of this Agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver.

As could be imagined, like so many of the feverish mergers and acquisitions of the 1980's, the transaction soon fell apart.

Forum had been operating for more than a year at the time of the acquisition and had built up relationships with customers and suppliers. It had accounts receivable of approximately $350,000.00, and a library of films, including two which had produced retail revenues of over two million dollars each.

Under the new MCEG management, Forum in 1988, moved its business operations to California, thereby forcing out of the

company seller Michael Olivieri who had understood that he would not be required to move. Less than two months after the acquisition of Forum by MCEG, MCEG, Forum and Medusa Communications ("Medusa") entered into a "consulting" agreement pursuant to which one half of the pre-tax profits of Forum were to be paid to MCEG and Medusa.

Almost immediately thereafter, MCEG sold 35% of Forum's shares to Medusa for $280,000.00. In August of 1989 defendants Krane, Rouhana and Winstar caused Forum to enter into an agreement with Medusa and Virgin Visions, Inc., the result of which was to transfer most if not all of the ongoing business efforts of Forum and MCEG to Virgin Visions, Inc. Bankruptcy followed.

FIRST CLAIM

Section 12(2) of the 1933 Act provides that an action may be brought against any person who offers or sells a security "by means of a prospectus of oral communication, which includes an untrue statement or material fact, or omits to state a material fact necessary in order to make the statement . . . not misleading." 15 U.S.C. § 77-1(2). The representations relied on are that MCEG, Rouhana and Winstar represented that: (1) Forum would pay the 12% per annum dividends on plaintiff's preferred stock. This it did, until bankruptcy intervened, although the payments were late; (2) Plaintiff would have a "put" option to compel Forum to repurchase the preferred shares. This he did have under the Agreement, but the intervening bankruptcy frustrated any repurchase; (3) MCEG would develop and expand the business of Forum; and (4) MCEG would acquire Mr. Weinberg's other companies.

Appendix C

There is no allegation that plaintiff either tendered his Forum shares in rescission or sold them although damages are requested. Since this Court concludes that no trial jury could find in plaintiff's favor on the First Claim pleaded, defendants are entitled to summary judgement. A representation that Forum would acquire Mr. Weinberg's other businesses is simply to vague to be relied upon. It amounts at most to a representation that there will be an agreement to agree, which is traditionally not material or actionable. There is no evidence to support an inference that at the time of the sale of the security (the preferred stock) defendants Rouhana or Winstar had the present intention not to develop and expand the business. Indeed, insofar as concerns defendant Krane, plaintiff had no negotiations or discussions with him whatsoever, prior to the sale.

SECOND CLAIM

To survive judgment on a claim based on Rule 10b-5, plaintiff must present evidence supporting the existence of "material misstatements or omissions indicating an intent to deceive or defraud in connection with the purchase or sale of a security." *Luce v. Edelstein* 802 F.2d 49, 55 (2d Cir. 1986). Plaintiff must show that defendants acted with scienter — knowledge of the falsity or misleading nature of the representations, combined with an intent to deceive. *Bloor v. Caro* 754 F.2d 57, 61 (2d Cir. 1985). While a breach of contract may constitute securities fraud if a specific promise to perform a particular act in the future, or cause a corporation to do so, was made with the secret intention at the time, not to perform in the future, *Luce, supra* at 55-56, there must be some facts or circumstances shown to permit the inference of such a contemporaneous secret intent. Fraud is never presumed, and in the absence of some such evidence, summary judgment on this claim is appropriate.

Appendix C

THIRD CLAIM

We are at a loss to imagine why a count of common law fraud would be pleaded in a Rule 10b-5 case. Dismissal of the third count would seem to follow *a fortiori*. In any event, the parties were dealing at arms length, through lawyers, resulting in an Agreement with a rather detailed merger clause. Under the totality of circumstances present, there is no reasonable reliance.

FOURTH CLAIM

This branch of the complaint pleads a good claim for corporate waste by the individual defendants as officers and directors of Forum, dealing with MCEG, in which they also had interests of a conflicting nature. There is much evidence to suggest a breach of fiduciary duty. The difficulty is that this claim belongs to Forum and must be asserted derivatively for the benefit of Forum's shareholders and creditors. There is no showing that this plaintiff has the permission of the Bankruptcy Court to maintain litigation on this issue for the debtor, or that the necessary prior demand has been made. Furthermore, MCEG, a necessary defendant, is protected by the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362.

FIFTH CLAIM

To the extent that this court charges that "defendants" have breached the Stock Purchase Agreement by "failing to cause Forum to pay . . . dividends on the preferred shares" or to repurchase the preferred shares, Complaint ¶¶ 41-42, defendants MCEG and Forum are protected by the automatic stay mentioned above. Also, a corporation without earnings or surplus cannot be required to pay preferred dividends or redeem preferred stock.

To the extent Rouhana or Krane caused Forum to do this, they cannot be sued individually, since the contract was solely with Forum. *Gold v. Royal Cigar Co., Inc.*, 105 A.D.2d 831, 482 N.Y.S. 2d 32 (1984). To the extent the Fifth Claim repeats the claim of breach of fiduciary duty and corporate waste charged in the Fourth Claim, the same result follows as mention above.

RICO AND RICO CONSPIRACY

The Rico claims are essentially frivolous, there being no evidence of a pattern of racketeering activity or a criminal scheme to defraud.

CONCLUSION

Summary judgment is granted to defendants dismissing all counts. Such disposition is without prejudice to a derivative action for corporate waste or breach of fiduciary duty or unlawful diversion of the corporate assets of Forum. While this Court is not sure that ours is proper venue for such a claim, plaintiff is granted a period of sixty (60) days within which if so advised, and upon complying with all conditions precedent for such litigation, including but not limited to obtaining the authority of the Bankruptcy Code to sue in the right of Forum, and relief from the stay, as to MCEG, he may serve and file an amended complaint. If applications to the Bankruptcy Court are pending for such permission and remain unresolved, this Court will enlarge the sixty (60) day period on notice. Otherwise the Clerk will enter judgement on the expiration of such period, consistent with the foregoing.

Appendix C

SO ORDERED.

Dated: April 22, 1992
White Plains, New York

s/ Charles L Brieant
Charles L. Brieant
Chief Judge